(3)

No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Federal Service Labor Management Relations Statute, 5 U.S.C. 7114(a)(2)(B), gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of that provision, notwithstanding the provisions of the Inspector General Act, 5 U.S.C. App. 3, that insulate the OIG from agency control.

2. Whether, if OIG interviews are governed by 5 U.S.C. 7114(a)(2)(B), an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with 5 U.S.C. 7114(a)(2)(B), notwithstanding the fact that the Inspector General Act deprives an agency head of authority to direct or control the investigations of the OIG.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 120 F.3d 1208. The decision and order (Pet. App. 21a-57a) of the Federal Labor Relations Authority (FLRA) is reported at 50 F.L.R.A. 601.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1997. Pet. App. 1a. A petition for rehearing was denied on March 31, 1998. Pet. App. 76a. On June 22, 1998, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 29, 1998, and on July 24, 1998, further extended the time for filing to August 28, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent subchapters of the Federal Service Labor-Management Relations Statute (FSLMRS), enacted as Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, and in its entirety the Inspector General Act, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. App. 3,[1] are set forth in the statutory addendum to this brief.

STATEMENT

1. This case involves an alleged unfair labor practice committed when an investigative agent of an Office of Inspector General (OIG) interviewed a unionized federal employee who asserted certain rights created by the statute governing labor-management relations in the federal government. The issues can only be understood in light of the language, history, and purpose of two statutes enacted on consecutive days: the Inspector General Act, Pub. L. No. 95-452, § 1, 92 Stat. 1101 (Oct. 12, 1978), codified at 5 U.S.C. App. 3 § 1 *et seq.*; and the Federal Service Labor-Management Relations Statute (FSLMRS), Pub. L. No. 95-454, §§ 701, 703(a)(2), 92 Stat. 1191, 1217 (Oct. 13, 1978), codified at 5 U.S.C. 7101 *et seq.*

a. The Inspector General Act of 1978 established in each of a number of federal departments and agencies an Office of Inspector General, as an "independent and objective unit[]—(1) to conduct and supervise audits and investigations relating to programs and operations

[1] The Inspector General Act appears in the U.S. Code Annotated as the third numbered Appendix to Title 5, and in the U.S. Code as the second unnumbered Appendix to Title 5. We follow the practice of the parties and the court of appeals in citing the Act as 5 U.S.C. App. 3.

of the above establishments." 5 U.S.C. App. 3 § 2. The original statute created Offices of Inspector General for the Departments of Agriculture, Commerce, Housing and Urban Development, the Interior, Labor, and Transportation, and for the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans Administration. See Pub. L. No. 95-452, 92 Stat. 1101. Subsequent enactments established Offices of Inspector General for other departments and agencies. See, *e.g.*, Pub. L. No. 97-113, Tit. VII, § 705(a)(3), 95 Stat. 1544 (Agency for International Development); Pub. L. No. 97-252, Tit. XI, § 1117(b), 96 Stat. 751 (Department of Defense); Pub. L. No. 100-504, Tit. I, § 102(f), 102 Stat. 2517 (Nuclear Regulatory Commission, Department of the Treasury, Department of Justice). Offices of Inspector General created by statute now exist in nearly 60 federal establishments and entities, nearly half of which (27) are led by an Inspector General appointed by the President. See Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 1 (Apr. 27, 1998); President's Council on Integrity and Efficiency (PCIE) and Executive Council on Integrity and Efficiency (ECIE), *Fiscal Year 1997: A Progress Report to the President* 1 (hereafter PCIE, *Fiscal Year 1997 Report*).[2]

[2] Each of the 14 Cabinet departments has a statutory Inspector General appointed by the President. A number of federal agencies have Inspectors General created by statute and appointed by the head of the agency. For a listing of those OIGs, see Congressional Research Service, *Statutory Offices of Inspector General: Establishment and Evolution* 6 (Apr. 17, 1998).

The Inspector General Act was a response to deficiencies in auditing and investigative procedures within federal agencies, resulting from the control by agency management over the audit and investigation process. Thus, the House Report noted that "when complaints are received, investigators in some agencies are not permitted to initiate investigations without clearance from officials responsible for the programs involved." H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977). Congress received testimony about agency managers who had ordered investigations to be stopped or deprived investigative units of sufficient resources. *Id.* at 5-7.[3] As a result, Congress provided that, while the Inspector General "shall report to and be under the general supervision of the head of the establishment involved," the agency head may not "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subp[o]ena during the course of any audit or investigation." 5 U.S.C. App. 3 § 3(a). Congress further mandated the separation of investigative from operating responsibilities by providing that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a).

In conducting investigations, OIGs adhere to professional standards and guidelines promulgated by the Department of Justice. PCIE, *Fiscal Year 1997 Report*, *supra*, at 3. OIG investigative agents are trained at the Federal Law Enforcement Training Center (FLETC), where agents of the Secret Service, Bureau of Alcohol, Tobacco and Firearms (BATF), United States Marshals Service (USMS), and other federal law enforcement agency investigators also receive training. See Federal Law Enforcement Training Center, *Catalog of Training Programs Fiscal Year 1995* at 4-5 (1994) (listing participants). As of September 30, 1997, the OIGs led by a presidentially-appointed Inspector General had more than 2,000 criminal investigative agents.[4] Those agents must be skilled in all facets of law enforcement techniques, from using firearms to making arrests. See United States Civil Service Commission, *Grade-Level Guides for Classifying Investigator Positions, GS 1810/1811* at 5-17 (1972). Each Inspector General must "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law." 5 U.S.C. App. 3 § 4(d). "In FY 1997 alone, OIG investigations led to the recovery of almost $3 billion and the successful prosecution of 15,635, and the suspension or debarment of 6,365 people or businesses doing business with the government." PCIE, *Fiscal Year 1997 Report*, *supra*, at 3.

b. The Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, enacted as Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, established

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[3] See generally Congressional Research Service, *Statutory Offices of Inspector General: A 20th Anniversary Review* 2-7 (Apr. 27, 1998) (describing powers and functions of OIGs); P. Light, *Monitoring Government: Inspectors General and the Search for Accountability* 23-57 (1993) (describing background of Inspector General legislation and history of the concept of Inspectors General).

[4] That number is derived from a survey of OIGs conducted for a General Accounting Office report on Inspectors General scheduled to be issued after the submission of this brief and provided to the Solicitor General by the Vice Chair of the PCIE.

the right of federal employees to organize, select an exclusive representative, and engage in collective bargaining with agency management about a limited number of topics. The FSLMRS was designed to redress a perceived imbalance in the power relationships between an agency's management and its employees. The House report explained that "Title VII of the bill [the FSLMRS] establishes a statutory basis for labor-management relations in the Federal service" in lieu of the Executive Orders that governed those relations. H.R. Rep. No. 1403, 95th Cong., 2d Sess 38 (1978). "Title VII would for the first time enact into law the rights and obligations of the parties to this relationship – employees, agencies, and labor organizations." *Ibid.* In particular, it provides that when a "representative of the agency" examines an employee "in connection with an investigation" and the employee reasonably believes the examination may result in disciplinary action, the employee may upon request have a union representative present. 5 U.S.C. 7114(a)(2)(B).

According to records compiled by the Office of Personnel Management, as of January 1, 1997, the various agencies of the federal government had recognized 1,763 collective bargaining units represented by 91 different unions. See United States Office of Personnel Management, *Union Recognition in the Federal Government* I-5 to I-9 (June 1997). Those various entities had entered into 1,235 collective bargaining agreements. *Id.* at I-5. Although in some Executive departments the number of collective bargaining units recognized is low, such as the Department of Labor (3) and the Department of Education (1), in other departments many more distinct bargaining units have been recognized, such as in the Departments of Agriculture (87), Commerce (48), Health and Human Services (112),

Interior (146), Justice (23), Transportation (90), Treasury (37), and Veterans Affairs (62). *Id.* at I-2 to I-5. As of January 1, 1997, a total of 1,023,852 federal employees were covered by agreements between a union and a federal agency. *Id.* at I-5.

2. The unfair labor practice decision at issue in this case arose out of the investigation of an employee of the National Aeronautics and Space Administration George C. Marshall Space Flight Center (Marshall Center) in Huntsville, Alabama. The material facts are not disputed. See Pet. App. 23a-25a, 59a-63a.

a. In January 1993, NASA-OIG received information from the Federal Bureau of Investigation (FBI) that an employee at the Marshall Center, who throughout this litigation has been referred to as "P" (see Pet. App. 60a n.1), was suspected of authoring various incendiary documents. Pet. App. 23a. The documents had such titles as "Payback List," "Revenge Tactics," "Retribution List," "Goals 1990," and "Goals 1991"; the latter two described aims to seek revenge on enemies within the Marshall Center. See C.A. R.E. 20-22, 43; see also Pet. App. 60a. The documents named Marshall Center employees as potential targets for retribution and contained specific means and methods to get revenge, such as carbon monoxide poisoning, exploding natural gas under a house, making bombs, and injecting enemies with AIDS-infected blood. C.A. R.E. 20-21. Several documents had P's name on them, and a confidential source had identified P as their author. See *id.* at 21, 42. Investigators also received allegations that P had conducted surveillance of the homes of other employees. *Id.* at 43.

b. Upon obtaining that information from the FBI, NASA-OIG assigned the case a high priority and began investigating immediately. Pet. App. 23a-24a, 60a-61a;

C.A. R.E. 21, 42-44. NASA-OIG investigator Larry Dill sought to interview P as soon as possible and contacted him for that purpose. *Ibid.* P stated that he wanted both legal and union representation at the interview, and Dill acceded to both requests. Pet. App. 23a-24a, 61a. Patrick Tays attended the interview as a representative of P's Union, Local 3434 of the American Federation of Government Employees (Local 3434 or Union). Pet. App. 3a, 24a, 61a. At the interview in the office of P's attorney, Dill began by reading prepared "ground rules," which included the following: "The union representative, if present, serves as a witness and is not to interrupt the question and answer process. Additionally, the union representative is subject to being called as a witness for the government." *Id.* at 24a, 61a. The union representative, Patrick Tays, objected to the "ground rules," after which Dill read the statement a second time and stated that he would move the interview somewhere else if Tays did not "maintain himself." *Id.* at 24a, 61a-62a. During the interview, Dill did not initially respond to Tays' request to see a particular document, although apparently Tays was able to see that document (and others) by standing behind P and his attorney. *Id.* at 24a-25a, 61a-62a. Tays later testified that P was affected by Dill's manner toward him (Tays) and that P only paid attention to his attorney and Dill and ignored Tays. *Id.* at 24a-25a, 63a. P was ultimately fired, and his current whereabouts are unknown to petitioners or (apparently) to the Union. *Id.* at 63a.

c. The Union filed charges with the Federal Labor Relations Authority (FLRA) pursuant to 5 U.S.C. 7116(a)(1), alleging that NASA-OIG and NASA Headquarters had committed an unfair labor practice.[5] In particular, the Union charged that NASA-OIG and NASA Headquarters had violated 5 U.S.C. 7114(a)(2)(B), known as the "*Weingarten*" rule, which gives federal employees in a bargaining unit the right to the participation of a union representative at an examination by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action and requests representation.[6] The complaint alleged that petitioners violated the rule by refusing to allow the union representative to participate actively in the investigatory interview of P. Pet. App. 22a, 59a. The FLRA General Counsel issued a complaint containing that charge, pursuant to 5 U.S.C. 7118(a).

The OIG responded that it had acted reasonably in light of the "delicate situation" involving the safety of Marshall Center employees and that it had not interfered with Tays' rights to participate fully as a union representative. Pet. App. 63a. The administrative law judge (ALJ) concluded that the OIG investigator was a

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[5] Section 7116(a) provides, in pertinent part:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency —
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; [or]
>
> * * * * *
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

[6] The provision is known as the *Weingarten* rule because it extends to those federal employees covered by the provisions of the FSLMRS the rights established for private sector employees in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

"representative of the agency" for purposes of 5 U.S.C. 7114(a)(2)(B), that the union representative was entitled to participate actively in the interview of P, and that the OIG investigator's actions had interfered with the representative's ability to do so. Pet. App. 64a-71a. The ALJ recommended that the FLRA order NASA-OIG to cease and desist from interfering with *Weingarten* rights and to post at all NASA locations a notice that the NASA-OIG will not interfere with those rights. *Id.* at 71a-73a. Finding no evidence that NASA Headquarters "was responsible for this violation," the ALJ recommended dismissal of the charges against NASA Headquarters. *Id.* at 71a.

NASA-OIG appealed the decision to the FLRA, arguing principally that its investigator was not "a representative of the agency" under the D.C. Circuit's decision in *United States Dep't of Justice* v. *FLRA*, 39 F.3d 361 (1994) (*DOJ*). C.A. R.E. 71-80. The FLRA's General Counsel defended the ALJ's ruling against NASA-OIG, and did not take exception to the ALJ's ruling in favor of NASA Headquarters. See Pet. App. 27a-28a; C.A. R.E. 84-102. On July 28, 1995, the FLRA affirmed the ALJ finding of an unfair labor practice, concluding that Dill's announcement of the "ground rules" violated the statute and that, in conducting the interview, Dill was acting as a "representative" of NASA for purposes of the statutory *Weingarten* rule. Pet. App. 28a-48a. In reaching that conclusion, the FLRA rejected the D.C. Circuit's contrary analysis in *DOJ* and adopted instead the approach set forth in the Third Circuit's earlier decision in *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93 (1988) (*DCIS*). See Pet. App. 37a-40a. The FLRA based that conclusion on two premises: the OIG investigator is an employee of the agency and reports through a chain of

command that leads ultimately to the head of the agency; and the Inspector General provides investigatory information to the head of the agency. The FLRA concluded that the OIG investigator is a representative of agency management even though the Inspector General is largely independent of agency management and even though the OIG investigator is not part of the bargaining unit of the person under investigation. Pet App. 40a-43a. The FLRA reasoned that excluding OIG investigators from the category of "representative[s] of the agency" would open the door to evasion by the agency of its statutory responsibilities, Pet. App. 41 n.22, while in its view including OIG investigators as "representative[s] of the agency" subject to *Weingarten* rights would not in practice interfere with the mission of the OIG. Pet. App. 45a-48a.

In addition, the FLRA reversed the ALJ's ruling with respect to NASA Headquarters, holding that agency headquarters must be held responsible for the actions of NASA-OIG to effectuate the purposes of the statute, even though the FLRA General Counsel had not filed any exceptions to the ALJ's ruling that NASA Headquarters was not responsible for the conduct at issue. *Id.* at 49a-52a. The FLRA therefore ordered NASA Headquarters and NASA-OIG to cease and desist from restricting the participation of union representatives in interviews conducted by NASA-OIG. *Id.* at 52a-53a. The FLRA further directed NASA Headquarters to order NASA-OIG to comply with the requirements of 5 U.S.C. 7114(a)(2)(B) and to post appropriate notices at the Marshall Center. Pet. App. 53a-55a.

3. The FLRA immediately filed an application for enforcement in the Eleventh Circuit. C.A. R.E. 130, 132, 133. Four days after the FLRA's petition was

docketed in that court, NASA-OIG and NASA Headquarters filed a petition for review in the D.C. Circuit. C.A. R.E. 134. Both petitions were filed pursuant to 5 U.S.C. 7123(a), which provides that judicial review of the FLRA's decision or an action for enforcement by the FLRA may be filed "in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." Pursuant to 28 U.S.C. 2112(a) and Multidistrict Litigation Panel Rule 24, a panel randomly chose the Eleventh Circuit to hear the case.

The Eleventh Circuit granted the FLRA's application for enforcement and denied the petition for review filed by NASA and NASA-OIG. Pet. App. 20a.[7] The court deferred to the FLRA's interpretation of "representative of the agency" in 5 U.S.C. 7114(a)(2)(B), finding no evidence in the Inspector General Act that Congress sought to exempt the OIG from the statutory *Weingarten* rule. In so ruling, in most pertinent respects the court of appeals adopted the analysis of the Third Circuit in *DCIS*, *supra*, and specifically rejected the contrary decision of the D.C. Circuit in *DOJ*, *supra*. Pet. App. 7a-9a, 12a, 15a. The court of appeals also concluded that because OIG investigators conduct investigations and provide information to management that may be used to support administrative or disciplinary actions, the investigators are "representatives of the agency" despite their independence from control by agency management. Pet. App. 11a. The court concluded that subjecting OIG investigators to *Weingarten*

[7] The court of appeals also granted intervenor status to respondent American Federation of Government Employees, AFL-CIO. See Pet. App. 4a.

rights would not impermissibly hinder the OIG's ability to perform its essential function. Pet. App. 14a-15a. The court thus found NASA-OIG guilty of an unfair labor practice in failing to accord the employee his rights under 5 U.S.C. 7114(a)(2)(B). The court also found NASA Headquarters guilty of an unfair labor practice on the theory that it has a supervisory role over the OIG and, therefore, has a duty to ensure that the OIG complies with the *Weingarten* rule.

SUMMARY OF ARGUMENT

I. A. The FSLMRS provides that a federal unionized employee may request and receive representation by a union official at an examination in which the employee reasonably fears discipline if the examination is conducted by "a representative of the agency." 5 U.S.C. 7114(a)(2). The rights created under Section 7114 arise out of the collective bargaining relationship between the employee's union and agency management. As the phrase "representative of the agency" is used in Section 7114 and elsewhere in the FSLMRS, it refers to a representative of agency management, *i.e.*, the entity that has a collective bargaining relationship with the employee's union. See 5 U.S.C. 7103(a)(12) and 7114(a)(2)(A). Limiting the application of Section 7114(a)(2)(B) to the agency management that collectively bargains with the employee's union is consistent with the development of private sector labor law after this Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), which recognized the right of a union employee to union representation in an investigative interview by management The FLRA's construction erroneously equates any employee of the "agency" with "representative of the agency," ignoring the fact that the phrase "representative of the agency"

is a term of art with a particular meaning in a statute governing labor-management relations.

B. The Inspector General Act insulates the Inspector General from control by agency management in critical respects, so that an Inspector General and OIG investigators are not representatives of agency management. The Inspector General has discretion in what investigations to conduct and how to conduct them; the agency head cannot "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a). The Inspector General also has reporting functions – to Congress and to the Attorney General (when the OIG uncovers evidence of criminal activity) – that distinguish its responsibilities from those of agency management and shield it from political pressure. Although Congress required that an Inspector General be under the "general supervision" of the agency head, that requirement merely facilitates a workable relationship between the agency head and the Inspector General and does not limit the Inspector General's independence in performing the functions prescribed under the Inspector General Act. Congress also prohibited the Inspector General from performing the policy and programmatic functions of agency management and excluded OIGs from the collective bargaining process altogether. To compel OIG investigators to comply with 5 U.S.C. 7114(a)(2)(B) would be inconsistent with the requirements imposed under the Inspector General Act prohibiting OIGs from disclosing certain investigative information and ensuring the OIG's freedom to investigate allegations of misconduct. The FLRA and the court of appeals recognized that the term "representative of the agency" does not include law enforcement officers charged with investigating misconduct by

agency employees for possible criminal prosecution or administrative sanction, but it failed to recognize that under the Inspector General Act OIG investigators are such law enforcement officers, rather than aides of agency management.

C. The FLRA decision is not entitled to deference. First, to the extent it reads 5 U.S.C. 7114(a)(2)(B) to govern interviews by persons other than representatives of agency management, that construction is erroneous in light of the statutory text and the context in which it appears in the statute. Second, the FLRA's application of the statute to OIG investigators depends on an assessment of the relationship between an OIG and agency management, a question as to which the FLRA has no expertise and is entitled to no deference.

D. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as principally designed to protect federal employees in any investigation that might lead to disciplinary action. In so doing, the court overlooked the fact that the FSLMRS concerns the collective bargaining relationship between agency management and federal employee unions, and not the investigation of employee misconduct by law enforcement agencies like the FBI, which can also result in the imposition of discipline. Because the Inspector General is more like the FBI than an arm of management, OIG investigators are not subject to the requirements of Section 7114(a)(2)(B).

II. If the Court agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B), it need not decide the second issue presented— whether NASA Headquarters is liable for an unfair labor practice because of the OIG's actions. But even if an OIG investigator were properly regarded as a representative of the agency, it would not

logically follow that an agency headquarters is liable for the investigator's conduct. The provisions of the Inspector General Act establishing the independence of OIGs from agency management deprive agency management of responsibility for any unfair labor practice committed by an OIG.

ARGUMENT

I. AN OIG INVESTIGATOR IS NOT "A REPRESENTATIVE OF THE AGENCY" WITHIN THE MEANING OF 5 U.S.C. 7114(a)(2)(B) AND THUS NEED NOT PERMIT A UNION REPRESENTATIVE TO PARTICIPATE IN AN OIG INVESTIGATIVE INTERVIEW

The FSLMRS provides that "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at * * * any examination of an employee in the unit *by a representative of the agency* in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. 7114(a)(2)(B) (emphasis added).

The FLRA and the Eleventh Circuit held in this case that an investigator from NASA's Office of Inspector General is "a representative of the agency" within the meaning of that statute, but in so doing they misunderstood both the purpose of the FSLMRS to regulate relations between employees and management, and the purpose of the Inspector General Act to create investigative offices that are independent of agency management. An examination of the text and purposes of both statutes shows that a "representative of the agency" under the FSLMRS means a representative of agency management, and that an OIG investigator is not such a representative and therefore is not

required to comply with 5 U.S.C. 7114(a)(2)(B) when conducting investigative interviews.

A. A "Representative of the Agency" Within The Meaning Of 5 U.S.C. 7114(a)(2)(B) Is A Representative Of Agency Management That Has A Collective Bargaining Relationship With The Union

1. The *Weingarten* right is contained in 5 U.S.C. 7114, which is entitled "Representation rights and duties." All of the rights and duties in Section 7114 arise out of the collective bargaining relationship between a union and management. Section 7114(a)(2) creates and defines a labor organization's right to "exclusive representati[on]" of the employees in the unit; Section 7114(a)(2)(A) addresses the union's right to participate at a "formal discussion" between management and employees concerning "grievance[s] or * * * personnel polic[ies] or practices or other general condition[s] of employment"; and Sections 7114(a)(4) and 7114(b) address the duty of both agency management and the union to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement" covering that agency's employees. Section 7114(a)(2)(B) therefore must likewise be understood as a component of the "[r]epresentation rights and duties," meaning that it, too, is connected to the labor-management collective bargaining relationship. See *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislation's text"); see also *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citations omitted).

2. The phrase "representative of the agency" is consistently used in the FSLMRS to describe a representative of management, meaning the entity that has a collective bargaining relationship with a union. Congress used the phrase in three places in the FSLMRS. First, Section 7103(a)(12) defines the term "collective bargaining" as

> the performance of the mutual obligation of *the representative of an agency* and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute * * * a written document incorporating any collective bargaining agreement reached.

5 U.S.C. 7103(a)(12) (emphasis added). Because the term "representative of an agency" is used to define the party to a collective bargaining relationship in Section 7103(a)(12), subsequent uses of the term in the FSLMRS should also be understood as referring to the management entity that has a collective bargaining relationship with a union.[8]

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[8] Section 7103(a)(12) refers to the "representative of *an* agency," while Section 7114(a)(2)(B) refers to the "representative of *the* agency," but that discrepancy results from the fact that the two statutory provisions operate at different moments in time. Prior to the time when an exclusive representative of the employees in a collective bargaining agreement is recognized, management is simply "an agency." After establishing a collective bargaining relationship, management becomes "*the* agency" with respect to the "[r]epresentation rights and duties" (5 U.S.C. 7114) that must be observed between labor and management.

Second, Section 7114(a)(2)(A) (immediately preceding the *Weingarten* right in Section 7114(a)(2)(B)), provides a right of union representation at "any formal discussion between one or more *representatives of the agency* and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment." 5 U.S.C. 7114(a)(2)(A) (emphasis added). Only parties who have a collective bargaining relationship engage in "formal discussion[s]" that pertain to grievances, personnel policies or practices, and conditions of employment. Thus the term "representatives of the agency" in Section 7114(a)(2)(A) clearly refers to the representatives of agency management, *i.e.*, the entity that has a collective bargaining relationship with the union.

The "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning," *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (internal quotation marks omitted). Because the term "representative of the agency" is generally used in the statute to contrast the management entity involved in the collective bargaining process with the representative of employees, "representative of the agency" in Section 7114(a)(2)(B) must also refer to a representative of management in the collective-bargaining relationship between an agency and its employees.

3. A construction of Section 7114(a)(2)(B) limiting the statutory *Weingarten* rights to disciplinary interviews conducted by the management entity that has a collective bargaining relationship with the interviewee's union is consistent with the history and purposes underlying the rule. Congressman Udall, whose amendment to H.R. 11280 became the FSLMRS, ex-

plained that the "provisions concerning investigatory interviews reflect the U.S. Supreme Court's holding in *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975)." 124 Cong. Rec. 29,184 (1978), reprinted in *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 926 (1979) (*Legislative History*).

In *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), this Court determined that the rule requiring the presence of a union representative at an investigatory interview conducted by management was a permissible construction of the employees' right, under Section 7 of the National Labor Relations Act, "to engage in * * * concerted activities for * * * mutual aid or protection." 29 U.S.C. 157. The Court stated that the rights enumerated in *Weingarten* arose out of the need to balance the power between the parties to the collective bargaining relationship:

> The union representative whose participation [the employee] seeks is, however, safeguarding not only the particular employee's interest, but also the interests of the entire *bargaining unit* by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the *bargaining unit* that they, too, can obtain his aid and protection if called upon to attend a like interview. * * * Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management."

420 U.S. at 260-261, 262 (quoting *American Shipbuilding Co.* v. *NLRB*, 380 U.S. 300, 316 (1965)) (footnote omitted) (emphasis added). The D.C. Circuit has emphasized that point: "The Supreme Court in *Weingarten*, and the National Labor Relations Board, viewed the matter [of representational rights] in terms of 'bargaining power.'" *DOJ*, 39 F.3d at 368. "These considerations do not apply to examinations of employees under oath in the course of an Inspector General's investigation" because the OIG's independence means that "the Inspector General cannot side with management, or the union." *Ibid.*

In the private sector, the *Weingarten* right has been strictly confined to apply only when a representative of management interviews a bargaining unit employee and the employee reasonably fears discipline. When management interviews an employee who is *not* in the bargaining unit, the *Weingarten* right does not apply. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. 627 (1988), review denied per curiam sub nom. *Slaughter* v. *NLRB*, 876 F.2d 11 (3d Cir. 1989). See generally K. Judd, *The* Weingarten *Right in a Nonunion Setting: A Permissible and Desirable Construction of the National Labor Relations Act*, 19 Memphis St. L. Rev. 207, 213-217 (1989) (describing evolution of NLRB rulings culminating in decision that non-unionized employee does not have *Weingarten* rights). Similarly, when an entity other than management, such as a law enforcement officer, interviews a bargaining unit employee who might subsequently face discipline as a

result of information obtained in the interview, the employee has no right to the presence of a union representative.[9] Although Section 7 of the National Labor Relations Act at issue in *Weingarten* is worded differently from 5 U.S.C. 7114(a)(2)(B), nothing in the text or history of the FSLMRS suggests that Congress intended public sector employees to enjoy a right to union representation outside the labor-management relationship recognized in *Weingarten* and its progeny.

4. a. The FLRA's contrary position amounts to a determination that a "representative" of the "agency" must mean any official within the parent agency, because otherwise an agency could avoid its statutory responsibilities by using personnel from a sub-component of the agency other than the employee's to conduct investigative interviews. Pet. App. 41a n.22. But the FLRA's strained construction of the statute is not necessary to prevent evasion, because any person acting at the direction of management and under management's control can be a "representative of the agency" within the meaning of Section 7114(a)(2)(B), without regard to job title. Nonetheless, "representative of the agency" is a term of art. The critical provisions of the FSLMRS, Sections 7103(a)(12) and 7114, are worded in terms of two entities on either side of the bargaining table: the "exclusive representative of employees in an appropriate unit in the agency" that represents labor and the "representative of the agency" that represents management. Thus, there is no support in the text itself for the FLRA's attempt to extend

[9] That proposition appears to be so well understood that it is not even discussed in treatises describing *Weingarten* rights. See, *e.g.*, 3 T. Kheel & M. Eisenstein, *Labor Law* § 10.06 (1998); W. Hartsfield, *Investigating Employee Conduct* § 10.40 (1998).

Weingarten coverage beyond agency management to any official housed within the agency. Nor is there any warrant for extending coverage to the Inspector General to prevent evasion of the rule, since as set forth below, the agency has no power to direct the Inspector General to conduct investigative interviews in aid of management functions.

b. The FLRA's construction leads to what the D.C. Circuit has described as a "semantic difficulty": there is no agency that the OIG investigator can be said to "represent" within the meaning of Section 7114(a)(2)(B). The investigator cannot represent the agency (or component of the agency) that directly employs the person under investigation, because the investigator is not in that entity and the employing agency "could not direct the investigator, and * * * ha[s] no control over him." 39 F.3d at 365. And the OIG itself cannot be the agency contemplated by Section 7114(a)(2)(B) in the phrase "representative of the agency," 39 F.3d at 365, because the "agency" in that phrase must be an entity that contains the employee's bargaining unit. See also pages 31-32, *infra*. The OIG does not in fact contain the bargaining unit to which the employee under investigation belongs, 39 F.3d at 365-366, nor could it do so, because the FSLMRS, 5 U.S.C. 7112(b)(7), expressly "forbids the formation of bargaining units containing employees primarily engaged in investigating other agency employees to ensure they are acting honestly—an apt description of investigators working for the Inspector General." 39 F.3d at 365 n.5 (citing *Nuclear Regulatory Comm'n* v. *FLRA*, 25 F.3d 229, 235 (4th Cir. 1994)).[10]

[10] The Senate bill would have excluded investigative and audit employees from coverage under the FSLMRS only if the agency

c. The FLRA apparently recognizes that law enforcement officers cannot properly be treated as "representative[s] of the agency" that employs them. Thus, it has conceded that FBI agents need not comply with Section 7114(a)(2)(B) when investigating unionized federal employees within the Department of Justice, even though FBI agents themselves are employees of that Department. See FLRA C.A. Br. 39[11]; see also Union-Intervenor C.A. Br. 29, 40. Presumably by the same logic the provision would not apply to other law enforcement officers investigating employees of their parent agency, such as Secret Service agents (employed by the Department of the Treasury) investigating currency counterfeiting by a unionized Treasury employee, or agents of the Bureau of Tobacco, Alcohol and Firearms (also employed by the Department of the Treasury) investigating illegal gun or alcohol trafficking by unionized Treasury employees. Thus, the FLRA's determination that OIG investigators are covered by Section 7114(a)(2)(B) depends on a characterization of

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head determined that exclusion was necessary for the internal security of the agency. *Legislative History*, *supra*, at 563-564 (S. 2640 § 7202(c)). That exclusion, however, which parallels the exclusion of employees of the FBI and CIA, was made nondiscretionary in the version of the statute that was enacted into law. See *id.* at 141-142 (H.R. 13), 258 (H.R. 9094), 399-400 (H.R. 11280), and 972-973 (Udall substitute).

[11] The FLRA explains its decision to exempt FBI agents from the statutory *Weingarten* rule by citing 28 U.S.C. 535(a), which confers authority on the FBI to "investigate any violation of title 18 involving Government officers and employees – (1) notwithstanding any other provision of law." See FLRA C.A. Br. 39. That provision, however, is more naturally read as preserving the concurrent jurisdiction of the FBI to investigate offenses that Congress also charged other law enforcement agencies (such as OIGs) with investigating.

those investigators as more like administrative aides to the agency head than like law enforcement officers. That characterization rests on a fundamental misconception of the nature of a statutory Inspector General, a question governed not by the FSLMRS, which the FLRA is charged with administering, but by the Inspector General Act, to which we now turn.

B. The Inspector General Act Establishes That An Inspector General Is Not A Representative Of Agency Management Within The Meaning Of 5 U.S.C. 7114(a)(2)(B)

1. The Inspector General Act makes an OIG independent of agency management

As a general matter, the OIG's grant of statutory authority is entirely different from and independent of the grant of authority to the head of the agency. Compare 5 U.S.C. App. 3 § 9(a)(1)(P) (creating the Office of Inspector General of NASA) with 42 U.S.C. 2472 (creating NASA).[12] The Inspector General Act provides that the Inspector General for each department shall lead an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, and be "appointed by the President" with "the advice and consent of the Senate, without regard to political affiliation and solely on the basis of

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[12] That differentiation is common among agencies and their OIGs. Compare, *e.g.*, 7 U.S.C. 2201 (creating Department of Agriculture) with 5 U.S.C. App. 3 § 9(a)(1)(A) (creating Agriculture OIG); 20 U.S.C. 3411 (creating Department of Education) with 5 U.S.C. App. 3 § 9(a)(1)(D) (creating Education OIG); 29 U.S.C. 551 (creating Department of Labor) with 5 U.S.C. App. 3 § 9(a)(1)(J) (creating Labor OIG); 42 U.S.C. 3532 (creating Department of Housing and Urban Development) with 5 U.S.C. App. 3 § 9(a)(1)(G) (creating HUD OIG); 42 U.S.C. 7131 (creating Department of Energy) with 5 U.S.C. App. 3 § 9(a)(1)(E) (creating Energy OIG).

integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations," 5 U.S.C. App. 3 § 3(a). That general directive to an Inspector General to be "independent" within the agency is complemented by specific statutory functions that OIGs must perform free of agency management direction.

a. When the OIG conducts investigations of potential criminal and administrative law violations, neither the agency head nor the deputy may "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation." 5 U.S.C. App. 3 § 3(a).[13] Instead, the OIG is authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishments as are, *in the judgment of the Inspector General*, necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2) (emphasis added). As the House Report on the Inspector General Act explained, "[t]he purpose of this language is to insure that no restrictions are placed upon the Inspector General's freedom to investigate fraud, program abuse and other problems

[13] A narrow exception to that general principle is set forth in the special provisions of the Inspector General Act that authorize the Attorney General to prevent the Department of Justice OIG (DOG-OIG) from proceeding with an investigation that would disclose particularly sensitive law enforcement or national security information. See 5 U.S.C. App. 3 § 8E(a). According to the DOJ Inspector General, that provision has been invoked only once by the Attorney General since the creation of the DOJ-OIG. See M. Bromwich, *Running Special Investigations: The Inspector General Model*, 86 Geo. L.J. 2027, 2044 n.14 (1998). The Secretary of the Treasury has similar authority with respect to the Treasury OIG, see 5 U.S.C. App. 3 § 8D(a)(2), as does the Secretary of Defense with respect to an investigation or audit by the Department of Defense OIG, see 5 U.S.C. App. 3 § 8(b)(2).

relating to agency activities." H.R. Rep. No. 584, 95th Cong., 1st Sess. 14 (1977). See also 124 Cong. Rec. 30,952 (1978) (statement by Sen. Eagleton) (Inspector General Act "explicitly provides that even the head of the agency may not prohibit, prevent, or limit the Inspector General from undertaking and completing any audit and investigation which the Inspector General deems necessary"). Thus, if the head of the establishment asked the Inspector General "not to undertake a certain audit or investigation or to discontinue a certain audit or investigation," the Inspector General "would have the authority to refuse the request and to carry out his work." S. Rep. No. 1071, 95th Cong., 2d Sess. 26 (1978).

The Inspector General thus has the freedom to decide whether to investigate particular allegations of wrongdoing, what documents to request of agency officials, and what persons to interview. If during the course of an investigation the Inspector General learns of "reasonable grounds to believe that there has been a violation of Federal criminal law," the Inspector General Act requires him to "report expeditiously to the Attorney General," 5 U.S.C. App. 3 § 4(d), and to do so "directly, without notice to other agency officials," *NRC*, 25 F.3d at 234.[14]

[14] Conferring independence on the Inspector General was intended to correct a perceived deficiency in existing procedures for handling the investigation of internal affairs matters. "Justice Department officials responsible for prosecuting fraud against the Government testified that, with some exceptions, working relationships with other Federal departments and agencies on fraud matters are far from optimum." H.R. Rep. No. 584, *supra*, at 5. Those concerns were echoed in a floor statement by Representative Levitas, who observed that "administrators have an allegiance to their programs and are not inclined to pursue efforts that may

That independence in the conduct of investigations extends to the selection of personnel to perform the work. An Inspector General is empowered under the Inspector General Act to appoint an Assistant Inspector General for Investigations who is responsible "for supervising the performance of investigative activities relating to such programs and operations" of the agency. 5 U.S.C. App. 3 § 3(d)(2). An Inspector General also has the authority to select and employ whatever personnel are necessary to conduct its business, to employ experts and consultants, and to enter into contracts for audits, studies, and other necessary services. 5 U.S.C. App. 3 §§ 6(a), 7-9 (1994 & Supp. II 1996).

OIG investigative personnel conduct the full range of criminal and administrative investigations within the programmatic scope of the agency they oversee. 5 U.S.C. App. 3 § 4. See, *e.g.*, *New England Apple Council* v. *Donovan*, 725 F.2d 139, 143 (1st Cir. 1984) (as to those matters over which the OIG has investigative jurisdiction, the "functions of OIG investigators are no different from the functions of FBI agents"—both "investigate federal crimes, serve in undercover capacities, perform surveillance, and conduct investigatory interviews"); *Burlington Northern R.R.* v. *OIG*, 983 F.2d 631, 634 (5th Cir. 1993) (legislative history shows purpose of Inspector General Act "to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste and mismanage-

reveal fraud and reflect badly upon their programs. Who wants to be identified with a program that is full of cheaters?" 124 Cong. Rec. at 10,404-10,405.

ment in the programs and operations of [various executive] departments and agencies").[15]

b. The reporting functions of the OIG further demonstrate its independence from agency management. An Inspector General must submit semiannual reports to Congress on the results of the OIG's investigations. An agency head may add comments to the OIG's report, but cannot prevent the report from being transmitted to Congress or change its contents. 5 U.S.C. App. 3 § 5(b)(1). The same is true for reports of "particularly serious or flagrant problems, abuses, or deficiencies" in programs, which must be reported by the Inspector General to the head of the establishment involved and transmitted by that person to the appropriate committee or subcommittee of Congress within seven calendar days, along with a report prepared by the agency if the agency head deems one appropriate. 5 U.S.C. App. 3 § 5(d). Thus, in requiring certain reports by the Inspector General, Congress ensured that the agency head would have the authority to comment upon, but not alter, the Inspector General's report.[16]

[15] See, *e.g.*, U.S. Department of Agriculture Office of Inspector General, *Semiannual Report to Congress, FY 1998-Second Half* 4-5 (Nov. 1998) (describing food stamp and food program fraud investigations); Department of Health and Human Services Office of Inspector General, *Semiannual Report, April 1, 1998-September 30, 1998*, at 8-15, 23-25, 62-63 (describing medical laboratory fraud, employee misconduct, and criminal billing fraud investigations).

[16] The House report explained the rationale for this approach: "In order to prevent lengthy delays resulting from agency 'clearance' procedures, reports or information would be submitted by each Inspector General to the agency head and the Congress without further clearance or approval." H.R. Rep. No. 584, *supra*, at 3. See also S. Rep. No. 1071, *supra*, at 9 (The Inspector General "derives independence from the fact that the agency head can add

c. Although the Inspector General "report[s] to and [is] under the *general* supervision of the head [of the agency]," 5 U.S.C. App. 3 § 3(a) (emphasis added), only the President, not the agency head, may remove an Inspector General, 5 U.S.C. App. 3 § 3(b).[17] Congress imposed the requirement of "general supervision" to overcome concerns that the OIG's work might be "significantly impaired if [the Inspector General] does not have a smooth working relationship with the department head." S. Rep. No. 1071, *supra*, at 9. But that supervision does not extend to the most important specific functions performed by the OIG: "the agency head would have no authority to prevent the Inspector and Auditor General from initiating and completing audits and investigations he believes necessary." *Id.* at 7. Indeed, other than the "general supervision" of the agency head and one deputy, an Inspector General "shall not report to, or be subject to supervision by, any other officer of such [agency]." 5 U.S.C. App. 3 § 3(a).

Accordingly, "no one else in the agency may provide any supervision to [an] Inspector[] General," and an OIG is entirely "'shielded * * * from agency interference'" in the conduct of its work, *NRC*, 25 F.3d at

his comments to the semi-annual report" of the Inspector General "but cannot generally prevent it from going to Congress or change its contents.").

[17] Certain "designated Federal entities," listed in 5 U.S.C. App. 3 § 8G(a)(2) (1994 & Supp. II 1996), have an Inspector General appointed and removable by the head of the entity; in such entities if the Inspector General is removed from office the head of the entity must "promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress." 5 U.S.C. App. 3 § 8G(e). NASA, the agency at issue here, is not among the designated federal entities, which include, *inter alia*, the FLRA. See *ibid.*; 5 U.S.C. App. 3 §§ 9(a)(1)(P) and 11(2).

234, which includes the following responsibilities and powers: to conduct audits and investigations of the agency as the OIG deems "necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2); to have unfettered access to agency documents and personnel, 5 U.S.C. App. 3 § 6(a)(1) and (3)); to issue subpoenas for documentary evidence and administer oaths, 5 U.S.C. App. 3 § 6(a)(4) and (5)); and to "receive and investigate complaints or information from an[y] employee of the [agency] concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety," 5 U.S.C. App. 3 § 7(a).[18]

Just as agency management is prohibited from interfering with the functions of the OIG, so too the OIG is prohibited from performing the policy and programmatic functions of agency management. See generally *Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. Off. Legal Counsel 54

[18] The Inspector General Act, however, does not confer the authority on OIGs to compel testimony from witnesses through subpoenas. An employee witness who refuses an OIG request for an interview may be compelled by agency management to appear at an OIG investigative interview. See 5 U.S.C. App. 3 § 6(a)(3) (authorizing Inspector General "to request such information or assistance" as is needed) and § 6(b) (providing that "the head of any Federal agency shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation * * * furnish to such Inspector General * * * such information or assistance"). Such testimony cannot be used against the witness in a criminal proceeding. See, *e.g.*, *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973). An employee who refuses to cooperate with an OIG investigation may be punished administratively for that refusal by the employing agency. See generally *LaChance* v. *Erickson*, 118 S. Ct. 753 (1998); 5 U.S.C. 7513.

(1989). When Congress required the transfer of offices and employees to OIGs under the Inspector General Act, it expressly provided that "there shall not be transferred to an Inspector General * * * program operating responsibilities." 5 U.S.C. App. 3 § 9(a). That prohibition was intended "to prevent compromising the independence and objectivity of the Offices of Inspector General," H.R. Rep. No. 584, *supra*, at 15, as well as to give OIGs "absolutely no policy responsibility" in the running of Executive Branch establishments, 124 Cong. Rec. 10,404 (1978) (statement of Rep. Horton).[19]

In particular, the OIG does not have a collective bargaining relationship with any union or even with its own employees. See 5 U.S.C. 7112(b)(7) (prohibiting "any employee primarily engaged in investigative or audit functions" functions from participating in a bargaining unit). Moreover, an OIG is not in a position to "initiate or continue a practice of imposing punishment" with respect to a bargaining unit employee, *Weingarten*, 420 U.S. at 260-261, because only employers can impose punishment. An OIG lacks statutory authority to impose punishment; it can only investigate suspected

[19] As Representative Horton explained, "It is important, Mr. Speaker, to remember and to realize that this new Office of Inspector General will have absolutely no policy responsibility. The new IG's are to be totally independent and free from political pressure. If I have any reservations at all, they are concerned with that independence. I would merely suggest that we keep an eye on these IG's and see to it that they have the freedom to operate independently." 124 Cong. Rec. at 10,404. Representative Levitas took up that theme: "The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspector General will be responsible for audits and investigations only." *Id.* at 10,405.

waste, fraud, and abuse. See 5 U.S.C. App. 3 §§ 4, 6. Indeed, just because an OIG finds instances of wrongdoing does not mean that the agency necessarily will impose discipline.[20] Thus, the concerns expressed in *Weingarten* that management would use the disciplinary process as a means of exerting coercive influence over employees in derogation of collectively bargained provisions does not arise in the context of an OIG investigation. See *Weingarten*, 420 U.S. at 262.

2. *The Inspector General Act imposes obligations on the OIG that are inconsistent with 5 U.S.C. 7114(a)(2)(B)*

a. Attendance of a union representative at an OIG interview can interfere with the reporting and nondisclosure obligations imposed by the Inspector General Act. That Act provides that the Inspector General must report directly to the Attorney General (and not to the agency head) if the Inspector General finds reasonable grounds to believe there has been a violation of Federal criminal law. 5 U.S.C. App. 3 § 4(d). But the OIG's duty to maintain confidentiality would be undermined if its interviews were open to union representatives as required by *Weingarten*.

[20] An example of that exercise of agency management discretion occurred after the Department of Justice OIG made findings of wrongdoing within the FBI Crime Laboratory. See Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation Into Laboratory Practices and Alleged Misconduct in Explosives-Related And Other Cases* (1997). The Department of Justice management chose to impose discipline on only two FBI laboratory examiners among the thirteen past or present examiners and officers against whom the OIG had made findings of wrongdoing. See M. Sniffen, *Censure Urged for FBI Lab Employees*, Associated Press, Aug. 7, 1998.

The court of appeals mistakenly viewed the presence of a union representative as equivalent to the presence of legal counsel assisting an employee. See Pet. App. 14a. An attorney's first duty of loyalty is to the client, however, while a union representative's duty of loyalty is to the collective bargaining unit as a whole. See, *e.g.*, *E.I. DuPont de Nemours*, 289 N.L.R.B. at 629 (union steward has "obligation to represent the interests of the entire bargaining unit"). An employee's attorney may have incentives not to share information with other employees, in order to preserve the attorney-client privilege and avoid the appearance of witness tampering or obstructing a federal inquiry. See generally 18 U.S.C. 1512 (obstruction offense); P. Rice, *Attorney-Client Privilege in the United States* § 9.27 *et seq.* (1993) (describing what disclosures cause waivers of the privilege). By contrast, a union representative with a statutory right to attend an examination may well conclude that the interest of the bargaining unit would be best served by sharing information learned during the investigatory interview with other members of the collective bargaining unit, who might subsequently be interviewed or requested to produce documents. Thus the presence of a union representative has much more potential than that of a lawyer to undermine the investigation and the OIG's duty of confidentiality.

b. In addition, 5 U.S.C. App. 3 § 3 was designed to ensure that "no restrictions are placed upon the Inspector General's freedom to investigate" cases. H.R. Rep. No. 584, *supra*, at 14. By contrast, the statutory *Weingarten* provision as construed by the FLRA involves far more than the mere presence of a union representative at an interview, and thus imposes major restrictions on the OIG's freedom to investigate. Although the plain language of the statute requires

only the presence of a union representative at an interview, the FLRA has construed the Section 7114(a)(2)(B) right to include: the right to be informed in advance of the general subject of an examination so that the employee and union representative may consult before questioning begins, see *Federal Aviation Admin., New England Region, Burlington, Massachusetts*, 35 F.L.R.A. 645, 652-54 (1990); the right to halt the examination and to step outside the hearing of investigators to discuss with the union representative answers to the investigator's questions, see *United States Dep't of Justice, INS*, 46 F.L.R.A. 1526, 1553-1555, 1565-1569 (1993), rev'd on other grounds, *DOJ, supra*, 39 F.3d 361 (holding that the *Weingarten* right does not apply to OIGs, but the FLRA would recognize those rights in jurisdictions that require OIG compliance with 5 U.S.C. 7114(a)(2)(B)); and the right to negotiate for 48-hours' notice before an investigator can begin an examination (in criminal and non-criminal cases alike) of a union employee, see *U.S. Dep't of Justice, INS*, 40 F.L.R.A. 521, 549 (1991), rev'd on other grounds, *Department of Justice, INS* v. *FLRA*, 975 F.2d 218, 224-226 (5th Cir. 1992). If ultimately upheld by the courts as integral parts of the *Weingarten* rule, each of those rights would undermine an OIG's discretion to conduct an investigation in a manner consistent with sound practice. A union representative could do what the agency head cannot do – direct and limit how the Inspector General conducts an investigation. In concluding that NASA-OIG "points to no specific examples in which the assertion of *Weingarten* rights has interfered with OIG investigations," Pet. App. 14a, the court of appeals gave insufficient weight to the concerns expressed by OIGs over the broad expansion

of statutory *Weingarten* rights in the FLRA's decisions. See Gov't C.A. Br. 24.

One way in which OIGs have exercised their independence from agency management in conducting investigative work is through joint efforts with other law enforcement agencies. For example, according to data supplied by NASA-OIG, two-thirds of its investigative work consists of criminal investigations, and nearly one-half of those cases are conducted jointly with another law enforcement agency such as the FBI. Those joint investigations are typically conducted under a memorandum of understanding between an OIG and another law enforcement agency.[21] If the FLRA and the court of appeals were correct in characterizing OIG investigators as "representatives of the agency" subject to the *Weingarten* rule, then in a joint investigation conducted by the FBI and OIG the obligation to admit a union representative to an interview would depend on whether the particular interview was conducted by an FBI agent or an OIG investigator. That cannot be the law.

The OIG's independence is not diminished by the fact that an OIG investigation may eventually result in administratively-imposed discipline rather than criminal prosecution. It is widely recognized that allegations of workplace misconduct may lead to a criminal prose-

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[21] The FBI has memoranda of understanding (MOUs) with NASA-OIG and 17 other OIGs concerning referral and investigations of matters of "mutual interest." Most of those OIGs also have MOUs with the Attorney General deputizing their investigators as special agents with full law enforcement authority. The Department of Defense OIG and Department of Agriculture OIG have law enforcement authority pursuant to statute. See Pub. L. No. 105-85, § 1071, 111 Stat. 1897 (Defense OIG); 7 U.S.C. 2270 (Agriculture OIG).

cution, administrative discipline, or civil remedies. See, *e.g.*, FLRA C.A. Br. 39; Union-Intervenor C.A. Br. 42; Statement of DOJ Inspector General Michael Bromwich before the Commission on the Advancement of Federal Law Enforcement 4 (Nov. 12, 1998). The choice of sanction depends on many factors, including the strength of the evidence and the priorities that inform prosecutorial discretion. Those factors can be difficult to evaluate before an investigative interview has occurred or an investigation completed. The variety of possible outcomes to an investigation does not cast doubt on the independence or the law enforcement character of the agency that conducts the investigation.

As a practical matter, the FLRA order in this case plainly restricts the NASA-OIG investigation in a manner that directly contravenes the purposes of the Inspector General Act. The FLRA's order prevents NASA-OIG from questioning a NASA bargaining unit employee without union participation, no matter how serious the crime or what emergency circumstance might necessitate immediate questioning without the restrictions and limitations imposed by the FLRA. Pet. App. 52a. The court of appeals' affirmance of that order is inconsistent with the text of both the FSLMRS and the Inspector General Act.[22]

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[22] Finally, the silence of the FSLMRS in addressing its applicability to OIGs contrasts with Congress's deliberate inclusion of references to OIGs elsewhere in the Civil Service Reform Act (CSRA). The CSRA refers specifically to "the Inspector General of an agency" only in provisions relating to the creation of the Merit Systems Protection Board, see 5 U.S.C. 1213(a)(2); 5 U.S.C. 2302(b)(8)(B) & 2302(b)(9)(C), but not in the FSLMRS itself. The legislative history of the Inspector General Act in turn, refers to the CSRA only in connection with the same MSPB provision, and does not refer at all to the FSLMRA. See S. Rep. No. 1071, *supra*,

c. Finally, the FLRA has ruled that "nothing in section 7114(a)(2) * * * prevents parties from negotiating contractual rights to union representation beyond those provided by that section." *United States Dep't of Justice, Justice Management Div.*, 42 F.L.R.A. 412, 435 (1991). Thus a union may seek to expand the role of a union representative under the *Weingarten* rule, and to bargain such a proposal to impasse (or binding arbitration by the FLRA). See 5 U.S.C. 7119(b) and (c); see also *Social Sec. Admin.* v. *FLRA*, 956 F.2d 1280, 1282 (4th Cir. 1992) ("A duty to bargain over a proposal, therefore, does more than simply require an agency to negotiate; it subjects the agency to the possibility that the proposal will become binding.").

Indeed, in *United States Nuclear Regulatory Commission*, 47 F.L.R.A. 370, 377 (1993)—the decision reversed by the Fourth Circuit in *NRC*, *supra*, 25 F.3d 229—the FLRA ruled that organized components of an agency are required to negotiate regarding the "procedures" (5 U.S.C. 7106(b)(2)) and "appropriate arrangements" (5 U.S.C. 7106(b)(3)) that apply specifically to OIG investigations, even though the OIG itself was not a party to the collective bargaining agreement under the FSLMRS and is specifically prohibited under the Inspector General Act from the types of policy and programmatic responsibilities encompassed within the collective bargaining relationship. Despite the Fourth Circuit's reversal of that decision in *NRC*, the FLRA has given no indication of acquiescing in that decision in places outside of the Fourth Circuit.

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at 36. The silence of Section 7114 with respect to OIGs thus provides no support for the FLRA's conclusion that Congress intended to apply the provisions of the FSLMRS in OIG interviews of federal unionized employees.

Requiring OIGs to comply with the particular nuances of negotiated procedures contained in collective bargaining agreements could pose grave practical problems in numerous agencies that have dozens of different agreements with different unions. See pages 6-7, *supra*. Under the FLRA's approach, a violation of any such procedure by the OIG investigator would subject the OIG and the agency headquarters to an unfair labor practice charge.

C. The FLRA's Decision Is Not Entitled To Deference

The FLRA is ordinarily entitled to deference in its interpretation of the FSLMRS for a decision that is reasonable and consistent with the statutory text. *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 928 (1990); *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983). Deference is not appropriate in this case, however, for two reasons. First, the FLRA's decision is inconsistent with the statutory text, impermissibly expands the reach of the statutory mandate, and lacks a rational basis. See, *e.g.*, *NLRB* v. *FLRA*, 952 F.2d 523 (D.C. Cir. 1992). For the reasons described in Part I.A, *supra*, the FLRA's construction of the FSLMRS is contrary to the statutory language and thus is not entitled to deference.

Second, the FLRA's ruling in this case depends on a construction not of the FSLMRS, but also of the Inspector General Act, a subject about which the FLRA has no expertise whatsoever. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see, *e.g.*, *AFGE v. FLRA*, 46 F.3d 73, 76 (D.C. Cir. 1995) (stating that a court "of course, owe[s] no deference to the FLRA's interpretation of a statute that it is not charged with administering," and thus considers "*de novo* the effect of [statutes

other than the FSLMRS] on the * * * obligation to bargain over proposals relating to wages and benefits"). In misconstruing the Inspector General Act, the FLRA has violated the canon that statutes, where possible, should be construed to "foster harmony with other statutory and constitutional law." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("But where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quotations omitted). The FLRA has also ruled inconsistently with the admonition that the FSLMRS "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. 7101(b).

D. The Court Of Appeals' Analysis Is Based On Flawed Premises

1. The court of appeals mistakenly viewed 5 U.S.C. 7114(a)(2)(B) as designed to protect federal employees in any investigation that might lead to disciplinary action, overlooking that the statute governs only the relationship between labor and management in a bargaining unit. The court of appeals opined that:

> The Statute [5 U.S.C. 7114(a)(2)(B)], like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations.

Pet. App. 10a (citing *Defense Criminal Investigative Service* v. *FLRA*, 855 F.2d 93, 99 (3d Cir. 1988) (*DCIS*)).[23]

That conclusion is incorrect. As this Court noted in *Weingarten*, the concern there arose out of the unequal power between management – represented in *Weingarten* by a supervisor and a management-hired security officer – and the lone employee who was being interviewed. 420 U.S. at 261-262. The Court nowhere suggested that the potential for an employee to be disciplined by itself was sufficient to warrant the presence of a union representative for interviews conducted outside the context of the labor-management relationship.

Indeed, the prospect of disciplinary action alone cannot be the primary determinant in requiring the broad right to union representation advocated by the FLRA. If it were, an employee would have the right to union representation at an interview conducted by a police officer outside the presence of the employee's managers. Yet there are no reported decisions or scholarly commentaries even suggesting that a unionized employee has such a right in the law enforcement context, thus supporting the conclusion that it is well understood in private sector labor law that the employee has no such right. See pages 21-22 & n.9, *supra*.

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[23] The Eleventh Circuit reserved the question whether the *Weingarten* provision applies to interviews conducted in the course of a criminal investigation, see Pet App. 11a n.6, demurring for the time being on the Third Circuit's holding that the rule applies to all OIG interviews, whether criminal or administrative in nature. See *DCIS*, 855 F.2d at 100. In that respect, the Eleventh Circuit's view is inconsistent with *Weingarten* itself, which arose out of an investigation of an alleged crime. See 420 U.S. at 254-255.

Indeed, in this case both the FLRA and the Union have conceded that the *Weingarten* right would not apply to interviews of federal unionized employees by the FBI. See page 24, *supra*. An employee can reasonably believe that disciplinary action may follow an interview conducted by an FBI agent, because—like the OIG—the FBI routinely provides to agency management information about the investigation in the event prosecution is declined.[24] The same is true of the Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the U.S. Marshals Service, and the Immigration and Naturalization Service.[25] As the D.C. Circuit observed, "[i]t

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[24] The routine-use provisions regarding disclosure of FBI records provide as follows:

> Personal information from this system may be disclosed as a routine use to any Federal agency where the purpose in making the disclosure is compatible with the law enforcement purpose for which it was collected, e.g., to assist the recipient agency in conducting a lawful criminal or intelligence investigation, to assist the recipient agency in making a determination concerning an individual's suitability for employment and/or trustworthiness for employment and/or trustworthiness for access clearance purposes, or to assist the recipient agency in the performance of any authorized function where access to records in this system is declared by the recipient agency to be relevant to that function.

63 Fed. Reg. 8659, 8682 (1998). Those routine-use provisions also authorize disclosure to non-federal government entities in certain circumstances. See *ibid.*

[25] See 62 Fed. Reg. 36,572 (1997) (INS Alien File and Central Index System); 62 Fed. Reg. 26,555 (1997) (INS Law Enforcement Support Center Database); 61 Fed. Reg. 54,219 (1996) (DEA); 60 Fed. Reg. 56,648 (1995) (Secret Service, BATF, and other Treasury components); 60 Fed. Reg. 18,853 (1995) (U.S. Marshals Service); 54 Fed. Reg. 42,060 (1989) (FBI, USMS, and various Department of Justice record systems); 31 C.F.R. 1.36 (listing routine uses and other exemptions in disclosure of Treasury agencies' records). State law enforcement agencies that interview federal employees in the investigation of crimes also routinely provide reports of investigation or interviews to federal agency officials.

is impossible to believe Congress intended" that "the Federal Labor Relations Authority, through its administration of section 7114(a)(2)(B) * * *, may oversee questioning by FBI agents." *DOJ*, 39 F.3d at 366.

The court's view of the statute as protecting any employee facing possible disciplinary action is inconsistent with the fact that statutory coverage is limited to questioning *by* "representatives of the agency," and it is limited to questioning *of* employees who are members of a bargaining unit. The provisions of the FSLMRS do not apply to all federal employees. Although Congress found "collective bargaining in the civil service [to be] in the public interest" because it "facilitates and encourages amicable settlements of disputes between employees and their employers involving conditions of employment," 5 U.S.C. 7101, Congress excluded from the collective bargaining process large categories of federal workers, including members of the armed services, supervisors and managers, aliens or noncitizens who work for the United States outside the country, and members of the Foreign Service, 5 U.S.C. 7103, and further excluded from the bargaining unit confidential employees, personnel specialists, administrators of FSLMRS provisions, national security workers, and employees engaged in investigative and audit functions, 5 U.S.C. 7112(b). Thus, the court oversimplified in characterizing the purpose of 5 U.S.C. 7114(a)(2)(B) "to extend *Weingarten* protection to federal employees" (Pet. App. 10a), without

recognizing that the statutory rights at issue in this case apply only to "disputes between [certain federal] employees *and their employers* involving conditions of employment." 5 U.S.C. 7101(a)(1)(C) (emphasis added).

2. The Court of Appeals for the Second Circuit has recognized that an OIG investigator does not become a "representative of the agency" subject to Section 7114(a)(2)(B) merely because an investigation concerns "'possible misconduct' of employees 'in connection with their work,' *DCIS/FLRA*, 855 F.2d at 100, or because the information obtained might be used to 'support administrative or disciplinary actions,' *FLRA/NASA*, 120 F.3d at 1213." *FLRA* v. *United States Dep't of Justice*, 137 F.3d 683, 691 (2d Cir. 1997), cert. pending, No. 98-667. However, the Second Circuit shared the concern of the FLRA that "Congress would [not] have wanted the *Weingarten* protection of the [FSLMRS] to be circumvented by a request from an agency head to have an OIG agent conduct an interrogation of the sort normally handled by agency personnel, an interrogation beyond the scope of OIG functions." *Id.* at 690-691. Therefore, the Second Circuit held that an OIG investigator is not a representative of the agency subject to 7114(a)(2)(B) unless the agent is "merely accommodating the agency by conducting interrogation of the sort traditionally performed by agency supervisory staff in the course of carrying out their personnel responsibility." *Id.* at 691.

The Second Circuit's rule would introduce uncertainty into the OIG investigative process in order to solve a nonexistent problem. While an agency head may request an Inspector General to undertake an investigation, the agency head can neither compel the OIG to conduct a particular investigation nor direct the manner in which it is conducted. Instead, the OIG must

make an independent decision whether to conduct any particular investigation, based on the importance of the matter and the OIG's capacity to do the work. See 5 U.S.C. App. 3 § 6(a)(2) (Inspector General has authority "to make such investigations * * * as are, in the judgment of the Inspector General, necessary or desirable"). Once an OIG undertakes an investigation, it is no longer subject to the control of agency management. Indeed, the Inspector General retains the independence to conclude that the fault in a particular matter lies less with the employee than with agency management, such as through neglectful supervision or training. Likewise, an inquiry by an OIG that begins with allegations by workers may result in criticism of agency management or agency workers-or both.[26] And the OIG investigator who conducts an examination of a unionized employee is therefore not a "representative of management" subject to Section 7114(a)(2)(B).

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[26] Compare, *e.g.*, Department of Justice Office of the Inspector General, *Alleged Deception of Congress: The Congressional Task Force on Immigration Reform's Fact-finding Visit to the Miami District of INS in June 1995* (June 1996) (criticizing INS management for creating a false impression of working conditions in investigation sparked by union complaints) with Department of Justice Office of the Inspector General, *Operation Gatekeeper: An Investigation Into Allegations of Fraud and Misconduct* (July 1998) (rejecting employee allegations of wrongdoing by management and criticizing union for tactics that delayed the investigation).

II. NASA HEADQUARTERS IS NOT GUILTY OF AN UNFAIR LABOR PRACTICE IF NASA-OIG DOES NOT COMPLY WITH 5 U.S.C. 7114(a)(2)(B)

The court below also held that NASA Headquarters was liable for an unfair labor practice on the ground that NASA-OIG infringed on the employee's rights under 5 U.S.C. 7114(a)(2)(B). Pet. App. 18a-19a. That conclusion is inconsistent with the construction of 5 U.S.C. 7114(a)(2)(B) and the Inspector General Act set forth above. If an OIG investigator cannot be held to have committed an unfair labor practice because he is not a "representative of the agency," the agency headquarters itself cannot be liable for the OIG's actions.[27]

Even if an OIG could be charged with an unfair labor practice for violating a federal employee's statutory *Weingarten* rights, it does not logically follow that an agency headquarters is also liable for the OIG's action. The decision below incorrectly construed the Inspector General Act and the FSLMRS to hold NASA Headquarters liable for the NASA-OIG's actions in this case. See Pet. App. 19a.

Section 7116(a) of Title 5 sets out the circumstances in which "it shall be an unfair labor practice for an agency" to engage in certain practices. Assuming that the OIG is found liable for an unfair labor practice as the "agency" in Section 7116(a) that "interfere[d] with, restrain[ed], or coerce[d] any employee in the exercise of any right under this chapter," there is no indication in the text of Section 7116 that the agency head-

[27] The Court does not have to reach this issue if it agrees that an OIG investigator is not a "representative of the agency" under 5 U.S.C. 7114(a)(2)(B). A reversal on that issue would also require a reversal of the unfair labor practice charged against NASA Headquarters.

quarters in which the OIG resides would also be liable for the OIG's actions.

By contrast, numerous provisions of the Inspector General Act establish the independence of the Inspector General from the head of the agency. See pages 26-33, *supra*. Those provisions range from the general provision creating the OIG as an "independent and objective unit[]," 5 U.S.C. App. 3 § 2, to the specific provisions that preclude the agency head or the deputy from "prevent[ing] or prohibit[ing] the Inspector General from initiating, carrying out, or completing any audit or investigation," 5 U.S.C. App. 3 § 3(a). Just as an agency head cannot "prevent or prohibit" (*ibid.*) the Inspector General from starting or completing an investigation, there is no statutory authority for the agency head to engage in the lesser step of prescribing the procedures the OIG must follow in conducting an inquiry.

The Fourth Circuit's decision in *NRC* is persuasive authority for why the parent agency should not be held liable for the actions of the OIG. In *NRC*, the court considered whether the OIG's manner of conducting investigations was a proper subject of collective bargaining between the agency and the union. The court correctly held that it was not. 25 F.3d at 234. The court reasoned that to permit such bargaining "would impinge on the statutory independence of the Inspector General." *Ibid.* "One of the most important goals of the Inspector General Act was to make Inspectors General independent enough that their investigations and audits would be wholly unbiased." *Id.* at 233. See generally *id.* at 233-236. The court further rejected the FLRA's argument that "the power of 'general supervision' given to the two top agency heads could be used

to limit or restrict the investigatory power of the Inspector General." *Id.* at 234.

The court then noted its disagreement with how the FLRA had "chosen to expand the limited holding of *Defense Criminal Investigative Service*" because such an expansion "would directly interfere with the ability of the Inspector General to conduct investigations." 25 F.3d at 235. An agency can neither bargain over the manner in which an OIG conducts its investigations nor order an OIG to comply with an interpretation of law in conducting an investigation or audit about which the OIG might have a good-faith disagreement.[28] Such an order would "directly interfere with the ability of the Inspector General to conduct investigations," *ibid.*, in the same ways that an agency's collective bargaining over the investigative methods and rules adversely affects an OIG's independence.

[28] That concern is not hypothetical. As the examples at pp. 34-35, *supra*, highlight, the scope of statutory *Weingarten* rights is uncertain. An OIG and an agency headquarters could quite reasonably disagree over whether an investigator must follow certain procedures to comply with rules that the FSLMRS does not elucidate but that eventually become law through FLRA decisions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS CHAPTER 71—LABOR-MANAGEMENT RELATIONS
SUBCHAPTER I—GENERAL PROVISIONS

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which

are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not

obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the United States International Development Cooperation Agency, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, and the Government Printing Office, but does not include—

(A) the General Accounting Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority; or

(G) the Federal Service Impasses Panel.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes

firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional

employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

(i) on the basis of an election, or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of

the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other

individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the

action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority—

(1) by any person alleging—

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer

the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which—

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective

bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis

and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7113. National consultation rights

(a) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representa-

tive, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which

authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b)An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or non-

preferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with

regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this

subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the

charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, includeing factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences

and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that—

(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take

such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

(2) take any other appropriate disciplinary action.

APPENDIX B

INSPECTOR GENERAL ACT OF 1978

§ 1. Short title

This Act be cited as the "Inspector General Act of 1978".

§ 2. Purpose and establishment of Offices of Inspector General; departments and agencies involved

In order to create independent and objective units—

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments listed in section 11(2);

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;

there is hereby established in each of such establishments an office of Inspector General.

§ 3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of section 7324 of Title 5, United States Code, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service—

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.

§ 4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established—

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

(2) to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by section 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations;

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

(4) to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and nongovernmental entities with respect to (A) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by such establishment, or (B) the identification and prosecution of participants in such fraud or abuse; and

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

(b)(1) In carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall—

(A) comply with standards established by the Comptroller General of the United States for audits

of Federal establishments, organizations, programs, activities, and functions;

(B) establish guidelines for determining when it shall be appropriate to use non-Federal auditors; and

(C) take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General as described in paragraph (1).

(2) For purposes of determining compliance with paragraph (1)(A) with respect to whether internal quality controls are in place and operating and whether established audit standards, policies, and procedures are being followed by Offices of Inspector General of establishments defined under section 11(2), Offices of Inspector General of designated Federal entities defined under section 8F(a)(2), and any audit office established within a Federal entity defined under section 8F(a)(1), reviews shall be performed exclusively by an audit entity in the Federal Government, including the General Accounting Office or the Office of Inspector General of each establishment defined under section 11(2), or the Office of Inspector General of each designated Federal entity defined under section 8F(a)(2).

(c) In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall

report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

§ 5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems; disclosure of information; definitions.

(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30. Such reports shall include, but need not be limited to—

(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(5) a summary of each report made to the head of the establishment under section 6(b)(2) during the reporting period;

(6) a listing, subdivided according to subject matter, of each audit report issued by the Office during the reporting period and for each audit report, where applicable, the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs) and the dollar value of recommendations that funds be put to better use;

(7) a summary of each particularly significant report;

(8) statistical tables showing the total number of audit reports and the total dollar value of questioned costs (including a separate category for the dollar value of unsupported costs), for audit reports—

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including—

(i) the dollar value of disallowed costs; and

(ii) the dollar value of costs not disallowed; and

(D) for which no management decision has been made by the end of the reporting period;

(9) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management, for audit reports—

(A) for which no management decision had been made by the commencement of the reporting period;

(B) which were issued during the reporting period;

(C) for which a management decision was made during the reporting period, including—

(i) the dollar value of recommendations that were agreed to by management; and

(ii) the dollar value of recommendations that were not agreed to by management; and

(D) for which no management decision has been made by the end of the reporting period;

(10) a summary of each audit report issued before the commencement of the reporting period for which no management decision has been made by the end of the reporting period (including the date and title of each such report), an explanation of the reasons such management decision has not been made, and a statement concerning the desired timetable for achieving a management decision on each such report;

(11) a description and explanation of the reasons for any significant revised management decision made during the reporting period;

(12) information concerning any significant management decision with which the Inspector General is in disagreement; and

(13) the information described under Section 05(b) of the Federal Financial Management Act of 1996.

(b) Semiannual reports of each Inspector General shall be furnished to the head of the establishment involved not later than April 30 and October 31 of each year and shall be transmitted by such head to the appropriate committees or subcommittees of the Congress within thirty days after receipt of the report, together with a report by the head of the establishment containing—

(1) any comments such head determines appropriate;

(2) statistical tables showing the total number of audit reports and the dollar value of disallowed costs, for audit reports—

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including—

(i) the dollar value of disallowed costs that were recovered by management through collection, offset, property in lieu of cash, or otherwise; and

(ii) the dollar value of disallowed costs that were written off by management; and

(D) for which no final action has been taken by the end of the reporting period;

(3) statistical tables showing the total number of audit reports and the dollar value of recommendations that funds be put to better use by management agreed to in a management decision, for audit reports—

(A) for which final action had not been taken by the commencement of the reporting period;

(B) on which management decisions were made during the reporting period;

(C) for which final action was taken during the reporting period, including—

(i) the dollar value of recommendations that were actually completed; and

(ii) the dollar value of recommendations that management has subsequently concluded should not or could not be implemented or completed; and

(D) for which no final action has been taken by the end of the reporting period; and

(4) a statement with respect to audit reports on which management decisions have been made but

final action has not been taken, other than audit reports on which a management decision was made within the preceding year, containing—

(A) a list of such audit reports and the date each such report was issued;

(B) the dollar value of disallowed costs for each report;

(C) the dollar value of recommendations that funds be put to better use agreed to by management for each report; and

(D) an explanation of the reasons final action has not been taken with respect to each such audit report,

except that such statement may exclude such audit reports that are under formal administrative or judicial appeal or upon which management of an establishment has agreed to pursue a legislative solution, but shall identify the number of reports in each category so excluded.

(c) Within sixty days of the transmission of the semiannual reports of each Inspector General to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost. Within 60 days after the transmission of the semiannual reports of each establishment head to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost.

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the

Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

(e)(1) Nothing in this section shall be construed to authorize the public disclosure of information which is—

(A) specifically prohibited from disclosure by any other provision of law;

(B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or

(C) a part of an ongoing criminal investigation.

(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.

(3) Except to the extent and in the manner provided under section 6103(f) of the Internal Revenue Code of 1986 [26 U.S.C.A. § 6103(f)], nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.

(f) As used in this section—

(1) the term "questioned cost" means a cost that is questioned by the Office because of—

(A) an alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document governing the expenditure of funds;

(B) a finding that, at the time of the audit, such cost is not supported by adequate documentation; or

(C) a finding that the expenditure of funds for the intended purpose is unnecessary or unreasonable;

(2) the term "unsupported cost" means a cost that is questioned by the Office because the Office found that, at the time of the audit, such cost is not supported by adequate documentation;

(3) the term "disallowed cost" means a questioned cost that management, in a management decision, has sustained or agreed should not be charged to the Government;

(4) the term "recommendation that funds be put to better use" means a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including—

(A) reductions in outlays;

(B) deobligation of funds from programs or operations;

(C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;

(D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;

(E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or

(F) any other savings which are specifically identified;

(5) the term "management decision" means the evaluation by the management of an establishment of the findings and recommendations included in an audit report and the issuance of a final decision by management concerning its response to such findings and recommendations, including actions concluded to be necessary; and

(6) the term "final action" means—

(A) the completion of all actions that the management of an establishment has concluded, in its management decision, are necessary with respect to the findings and recommendations included in an audit report; and

(B) in the event that the management of an establishment concludes no action is necessary, final action occurs when a management decision has been made.

§ 6. Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized—

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: *Provided*, That procedures other than subpenas shall be used by the Inspector General to

obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of Title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of Title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for

audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.

(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the "appointing authority" for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the

Office of an Inspector General, be deemed to be a reference to such Inspector General.

§ 7. Complaints by employees; disclosure of identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

§ 8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning—

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and

the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the congressional committees specified in paragraph (3) and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall—

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor actions taken by all components of the Department in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) Notwithstanding section 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.

(e) For the purposes of section 7, a member of the Armed Forces shall be deemed to be an employee of the

Department of Defense, except that, when the Coast Guard operates as a service of another department or agency of the Federal Government, a member of the Coast Guard shall be deemed to be an employee of such department or agency.

(f)(1) Each semiannual report prepared by the Inspector General of the Department of Defense under section 5(a) shall include information concerning the numbers and types of contract audits conducted by the Department during the reporting period. Each such report shall be transmitted by the Secretary of Defense to the Committees on Armed Services and Governmental Affairs of the Senate and the Committee on National Security and the Committee on Government Reform and Oversight of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(2) Any report required to be transmitted by the Secretary of Defense to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified in such section, to the congressional committees specified in paragraph (1).

(g) The provisions of section 1385 of title 18, United States Code, shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act.

§ 8A. Special provisions relating to the Agency for International Development

(a) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Agency for International Development—

(1) shall supervise, direct, and control all security activities relating to the programs and operations of that Agency, subject to the supervision of the Administrator of that Agency; and

(2) to the extent requested by the Director of the United States International Development Cooperation Agency (after consultation with the Administrator of the Agency for International Development), shall supervise, direct, and control all audit, investigative, and security activities relating to programs and operations within the United States International Development Cooperation Agency.

(b) In addition to the Assistant Inspector Generals provided for in section 3(d) of this Act, the Inspector General of the Agency for International Development shall, in accordance with applicable laws and regulations governing the civil service, appoint an Assistant Inspector General for Security who shall have the responsibility for supervising the performance of security activities relating to programs and operations of the Agency for International Development.

(c) The semiannual reports required to be submitted to the Administrator of the Agency for International Development pursuant to section 5(b) of this Act shall also be submitted to the Director of the United States International Development Cooperation Agency.

(d) In addition to the officers and employees provided for in section 6(a)(6) of this Act, members of the Foreign Service may, at the request of the Inspector General of the Agency for International Development, be assigned as employees of the Inspector General. Members of the Foreign Service so assigned shall be responsible solely to the Inspector General, and the Inspector General (or his or her designee) shall prepare the performance evaluation reports for such members.

(e) In establishing and staffing field offices pursuant to sectior 6(c) of this Act, the Administrator of the Agency for International Development shall not be bound by overseas personnel ceilings established under the Monitoring Overseas Direct Employment policy.

(f) The reference in section 7(a) of this Act to an employee of the establishment shall, with respect to the Inspector General of the Agency for International Development, be construed to include an employee of or under the United States International Development Cooperation Agency.

(g) The Inspector General of the Agency for International Development shall be in addition to the officers provided for in section 624(a) of the Foreign Assistance Act of 1961 [22 U.S.C. § 2384(a)].

(h) As used in this Act, the term "Agency for International Development" includes any successor agency primarily responsible for administering part I of the Foreign Assistance Act of 1961 [22 U.S.C.A. § 2151 et seq.].

§ 8B. Special provisions concerning the Nuclear Regulatory Commission

(a) The Chairman of the Commission may delegate the authority specified in the second sentence of section 3(a) to another member of the Nuclear Regulatory Commission, but shall not delegate such authority to any other officer or employee of the Commission.

(b) Notwithstanding sections 6(a)(7) and (8), the Inspector General of the Nuclear Regulatory Commission is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments and employment, and the obtaining of such services, within the Nuclear Regulatory Commission.

§ 8C. Special provisions concerning the Federal Deposit Insurance Corporation

(a) Delegation.—The Chairperson of the Federal Deposit Insurance Corporation may delegate the authority specified in the second sentence of section 3(a) to the Vice Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, but may not delegate such authority to any other officer or employee of the Corporation.

(b) Personnel.—Notwithstanding paragraphs (7) and (8) of section 6(a), the Inspector General of the Federal Deposit Insurance Corporation may select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General

and to obtain the temporary or intermittent services of experts or consultants or an organization of experts or consultants, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the Federal Deposit Insurance Corporation.

§ 8D. Special provisions concerning the Department of the Treasury

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General of the Department of the Treasury shall be under the authority, direction, and control of the Secretary of the Treasury with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions, the disclosure of which could reasonably be expected to have a significant influence on the economy or market behavior;

(E) intelligence or counterintelligence matters; or

(F) other matters the disclosure of which would constitute a serious threat to national security or to

the protection of any person or property authorized protection by section 3056 of title 18, United States Code, section 202 of title 3, United States Code, or any provision of the Presidential Protection Assistance Act of 1976 (18 U.S.C. 3056 note; Public Law 94-524).

(2) With respect to the information described under paragraph (1), the Secretary of the Treasury may prohibit the Inspector General of the Department of the Treasury from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Secretary determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent significant impairment to the national interests of the United States.

(3) If the Secretary of the Treasury exercises any power under paragraph (1) or (2), the Secretary of the Treasury shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of the Treasury shall have oversight responsibility for the internal investigations performed by the Office of Internal Affairs of the Bureau of Alcohol,

Tobacco and Firearms, the Office of Internal Affairs of the United States Customs Service, and the Office of Inspections of the United States Secret Service, and the internal audits and internal investigations performed by the Office of Assistant Commissioner (Inspection) of the Internal Revenue Service. The head of each such office shall promptly report to the Inspector General the significant activities being carried out by such office.

(c) Notwithstanding subsection (b), the Inspector General of the Department of the Treasury may initiate, conduct and supervise such audits and investigations in the Department of the Treasury (including the bureaus and services referred to in subsection (b)) as the Inspector General of the Department of the Treasury considers appropriate.

(d) If the Inspector General of the Department of the Treasury initiates an audit or investigation under subsection (c) concerning a bureau or service referred to in subsection (b), the Inspector General of the Department of the Treasury may provide the head of the office of such bureau or service referred to in subsection (b) with written notice that the Inspector General of the Department of the Treasury has initiated such an audit or investigation. If the Inspector General of the Department of the Treasury issues a notice under the preceding sentence, no other audit or investigation shall be initiated into the matter under audit or investigation by the Inspector General of the Department of the Treasury and any other audit or investigation of such matter shall cease.

(e)(1) The Treasury Inspector General shall have access to returns and return information, as defined in section 6103(b) of the Internal Revenue Code of 1986

[26 U.S.C.A. 6103(b)], only in accordance with the provisions of section 6103 of such Code [26 U.S.C.A. 6103] and this Act.

(2) Access by the Inspector General to returns and return information under section 6103(h)(1) of such Code [26 U.S.C. 6103(h)(1)] shall be subject to the following additional requirements:

(A) In order to maintain internal controls over access to returns and return information, the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, shall provide to the Assistant Commissioner (Inspection) of the Internal Revenue Service written notice of the Inspector General's intent to access returns and return information. If the Inspector General determines that the Inspection Service of the Internal Revenue Service should not be made aware of a notice of access to returns and return information, such notice shall be provided to the Senior Deputy Commissioner of Internal Revenue.

(B) Such notice shall clearly indicate the specific returns or return information being accessed, contain a certification by the Inspector General, or in the absence of the Inspector General, the Acting Inspector General, the Deputy Inspector General, the Assistant Inspector General for Audits, or the Assistant Inspector General for Investigations, that the returns or return information being accessed are needed for a purpose described under section 6103(h)(1) of the Internal Revenue Code of 1986 [26

U.S.C. 6103(h)(1)], and identify those employees of the Office of Inspector General of the Department of the Treasury who may receive such returns or return information.

(C) The Internal Revenue Service shall maintain the same system of standardized records or accountings of all requests from the Treasury Inspector General for inspection or disclosure of returns and return information (including the reasons for and dates of such requests), and of returns and return information inspected or disclosed pursuant to such requests, as described under section 6103(p)(3)(A) of the Internal Revenue Code of 1986 [26 U.S.C.A. 6103(p)(3)(A)]. Such system of standardized records or accountings shall also be available for examination in the same manner as provided under section 6103(p)(3) of the Internal Revenue Code of 1986.

(D) The Inspector General shall be subject to the same safeguards and conditions for receiving returns and return information as are described under section 6103(p)(4) of the Internal Revenue Code of 1986 [26 U.S.C. 6103(p)(4)].

(f) An audit or investigation conducted by the Inspector General shall not affect a final decision of the Secretary of the Treasury or his delegate under section 6406 of the Internal Revenue Code of 1986 [26 U.S.C.A. 6406].

(g) Notwithstanding section 4(d), in matters involving chapter 75 of the Internal Revenue Code of 1986 [26 U.S.C. 7201 et seq.], the Inspector General shall report expeditiously to the Attorney General only offenses under section 7214 of such Code [26 U.S.C. 7214], unless

the Inspector General obtains the consent of the Commissioner of the Internal Revenue to exercise additional reporting authority with respect to such chapter.

(h) Any report required to be transmitted by the Secretary of the Treasury to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on Governmental Affairs and Finance of the Senate and the Committees on Government Operations and Ways and Means of the House of Representatives.

§ 8E. Special provisions concerning the Department of Justice

(a)(1) Notwithstanding the last two sentences of section 3(a), the Inspector General shall be under the authority, direction, and control of the Attorney General with respect to audits or investigations, or the issuance of subpenas, which require access to sensitive information concerning—

(A) ongoing civil or criminal investigations or proceedings;

(B) undercover operations;

(C) the identity of confidential sources, including protected witnesses;

(D) intelligence or counterintelligence matters; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described under paragraph (1), the Attorney General may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpena, if the Attorney General determines that such prohibition is necessary to prevent the disclosure of any information described under paragraph (1) or to prevent the significant impairment to the national interests of the United States.

(3) If the Attorney General exercises any power under paragraph (1) or (2), the Attorney General shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committees on Governmental Affairs and Judiciary of the Senate and the Committees on Government Operations and Judiciary of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(b) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the Department of Justice—

(1) may initiate, conduct and supervise such audits and investigations in the Department of Justice as the Inspector General considers appropriate;

(2) shall give particular regard to the activities of the Counsel, Office of Professional Responsibility of the Department and the audit, internal investigative, and inspection units outside the Office of Inspector General with a view toward avoiding

duplication and insuring effective coordination and cooperation; and

(3) shall refer to the Counsel, Office of Professional Responsibility of the Department for investigation, information or allegations relating to the conduct of an officer or employee of the Department of Justice employed in an attorney, criminal investigative, or law enforcement position that is or may be a violation of law, regulation, or order of the Department or any other applicable standard of conduct, except that no such referral shall be made if the officer or employee is employed in the Office of Professional Responsibility of the Department.

(c) Any report required to be transmitted by the Attorney General to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committees on the Judiciary and Governmental Affairs of the Senate and the Committees on the Judiciary and Government Operations of the House of Representatives.

§ 8F. Special provisions concerning the Corporation for National and Community Service

(a) Notwithstanding the provisions of paragraphs (7) and (8) of section 6(a), it is within the exclusive jurisdiction of the Inspector General of the Corporation for National and Community Service to—

(1) appoint and determine the compensation of such officers and employees in accordance with section 195(b) of the National and Community Service Trust Act of 1993; and

(2) procure the temporary and intermittent services of and compensate such experts and consultants, in accordance with section 3109(b) of title 5, United States Code, as may be necessary to carry out the functions, powers, and duties of the Inspector General.

(b) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits any report to the Congress under subsection (a) or (b) of section 5, the Chief Executive Officer shall transmit such report to the Board of Directors of such Corporation.

(c) No later than the date on which the Chief Executive Officer of the Corporation for National and Community Service transmits a report described under section 5(b) to the Board of Directors as provided under subsection (b) of this section, the Chief Executive Officer shall also transmit any audit report which is described in the statement required under section 5(b)(4) to the Board of Directors. All such audit reports shall be placed on the agenda for review at the next scheduled meeting of the Board of Directors following such transmittal. The Chief Executive Officer of the Corporation shall be present at such meeting to provide any information relating to such audit reports.

(d) No later than the date on which the Inspector General of the Corporation for National and Community Service reports a problem, abuse, or deficiency under section 5(d) to the Chief Executive Officer of the Corporation, the Chief Executive Officer shall report such problem, abuse, or deficiency to the Board of Directors.

§ 8G. Requirements for Federal entities and designated Federal entities

(a) Notwithstanding section 11 of this Act, as used in this section—

(1) the term "Federal entity" means any Government corporation (within the meaning of section 103(1) of title 5, United States Code), any Government controlled corporation (within the meaning of section 103(2) of such title), or any other entity in the Executive branch of the Government, or any independent regulatory agency, but does not include—

(A) an establishment (as defined under section 11(2) of this Act) or part of an establishment;

(B) a designated Federal entity (as defined under paragraph (2) of this subsection) or part of a designated Federal entity;

(C) the Executive Office of the President;

(D) the Central Intelligence Agency;

(E) the General Accounting Office; or

(F) any entity in the judicial or legislative branches of the Government, including the Administrative Office of the United States Courts and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol;

(2) the term "designated Federal entity" means Amtrak, the Appalachian Regional Commission, the Board of Governors of the Federal Reserve System, the Board for International Broadcasting, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Corporation for Public Broadcasting, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Election Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Trade Commission, the Legal Services Corporation, the National Archives and Records Administration, the National Credit Union Administration, the National Endowment for the Arts, the National Endowment for the Humanities, the National Labor Relations Board, the National Science Foundation, the Panama Canal Commission, the Peace Corps, the Pension Benefit Guaranty Corporation, the Securities and Exchange Commission, the Smithsonian Institution, the Tennessee Valley Authority, the United States International Trade Commission, and the United States Postal Service;

(3) the term "head of the Federal entity" means any person or persons designated by statute as the head of a Federal entity, and if no such designation exists, the chief policymaking officer or board of a Federal entity as identified in the list published pursuant to subsection (h)(1) of this section;

(4) the term "head of the designated Federal entity" means any person or persons designated by statute as the head of a designated Federal entity and if no such designation exists, the chief policymaking officer or board of a designated Federal entity as identified in the list published pursuant to subsection (h)(1) of this section, except that—

(A) with respect to the National Science Foundation, such term means the National Science Board; and

(B) with respect to the United States Postal Service, such term means the Governors (within the meaning of section 102(3) of title 39, United States Code);

(5) the term "Office of Inspector General" means an Office of Inspector General of a designated Federal entity; and

(6) the term "Inspector General" means an Inspector General of a designated Federal entity.

(b) No later than 180 days after the date of the enactment of this section [Oct. 18, 1988], there shall be established and maintained in each designated Federal entity an Office of Inspector General. The head of the designated Federal entity shall transfer to such office the offices, units, or other components, and the functions, powers, or duties thereof, that such head determines are properly related to the functions of the Office of Inspector General and would, if so transferred, further the purposes of this section. There shall not be transferred to such office any program operating responsibilities.

(c) Except as provided under subsection (f) of this section, the Inspector General shall be appointed by the head of the designated Federal entity in accordance with the applicable laws and regulations governing appointments within the designated Federal entity.

(d) Each Inspector General shall report to and be under the general supervision of the head of the designated Federal entity, but shall not report to, or be subject to supervision by, any other officer or employee

of such designated Federal entity. The head of the designated Federal entity shall not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation.

(e) If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.

(f)(1) For purposes of carrying out subsection (c) with respect to the United States Postal Service, the appointment provisions of section 202(e) of title 39, United States Code, shall be applied.

(2) In carrying out the duties and responsibilities specified in this Act, the Inspector General of the United States Postal Service (hereinafter in this subsection referred to as the "Inspector General") shall have oversight responsibility for all activities of the Postal Inspection Service, including any internal investigation performed by the Postal Inspection Service. The Chief Postal Inspector shall promptly report the significant activities being carried out by the Postal Inspection Service to such Inspector General.

(3)[1](A)(i) Notwithstanding subsection (d), the Inspector General shall be under the authority, direction, and control of the Governors with respect to audits or investigations, or the issuance of subpoenas, which require access to sensitive information concerning—

(I) ongoing civil or criminal investigations or proceedings;

(II) undercover operations;

(III) the identity of confidential sources, including protected witnesses;

(IV) intelligence or counterintelligence matters; or

(V) other matters the disclosure of which would constitute a serious threat to national security.

(ii) With respect to the information described under clause (i), the Governors may prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena, after such Inspector General has decided to initiate, carry out, or complete such audit or investigation or to issue such subpoena, if the Governors determine that such prohibition is necessary to prevent the disclosure of any information described under clause (i) or to prevent the significant impairment to the national interests of the United States.

(iii) If the Governors exercise any power under clause (i) or (ii), the Governors shall notify the Inspector General in writing stating the reasons for such exercise. Within 30 days after receipt of any such notice, the Inspector General shall transmit a copy of such notice to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives, and to other appropriate committees or subcommittees of the Congress.

(B) In carrying out the duties and responsibilities specified in this Act, the Inspector General—

(i) may initiate, conduct and supervise such audits and investigations in the United States Postal Service as the Inspector General considers appropriate; and

(ii) shall give particular regard to the activities of the Postal Inspection Service with a view toward avoiding duplication and insuring effective coordination and cooperation.

(C) Any report required to be transmitted by the Governors to the appropriate committees or subcommittees of the Congress under section 5(d) shall also be transmitted, within the seven-day period specified under such section, to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform and Oversight of the House of Representatives.

(3)[1] Nothing in this Act shall restrict, eliminate, or otherwise adversely affect any of the rights, privileges, or benefits of either employees of the United States Postal Service, or labor organizations representing employees of the United States Postal Service, under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement.

(4) As used in this subsection, the term "Governors" has the meaning given such term by section 102(3) of title 39, United States Code.

(g)(1) Sections 4, 5, 6 (other than subsections (a)(7) and (a)(8) thereof), and 7 of this Act shall apply to each Inspector General and Office of Inspector General of a

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[1] So in original. Two pars. (3) were enacted.

designated Federal entity and such sections shall be applied to each designated Federal entity and head of the designated Federal entity (as defined under subsection (a)) by substituting—

(A) "designated Federal entity" for "establishment"; and

(B) "head of the designated Federal entity" for "head of the establishment".

(2) In addition to the other authorities specified in this Act, an Inspector General is authorized to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office of Inspector General and to obtain the temporary or intermittent services of experts or consultants or an organization thereof, subject to the applicable laws and regulations that govern such selections, appointments, and employment, and the obtaining of such services, within the designated Federal entity.

(3) Notwithstanding the last sentence of subsection (d) of this section, the provisions of subsection (a) of section 8C (other than the provisions of subparagraphs (A), (B), (C), and (E) of subsection (a)(1)) shall apply to the Inspector General of the Board of Governors of the Federal Reserve System and the Chairman of the Board of Governors of the Federal Reserve System in the same manner as such provisions apply to the Inspector General of the Department of the Treasury and the Secretary of the Treasury, respectively.

(h)(1) No later than April 30, 1989, and annually thereafter, the Director of the Office of Management and Budget, after consultation with the Comptroller General of the United States, shall publish in the

Federal Register a list of the Federal entities and designated Federal entities and the head of each such entity (as defined under subsection (a) of this section).

(2) Beginning on October 31, 1989, and on October 31 of each succeeding calendar year, the head of each Federal entity (as defined under subsection (a) of this section) shall prepare and transmit to the Director of the Office of Management and Budget and to each House of the Congress a report which—

(A) states whether there has been established in the Federal entity an office that meets the requirements of this section;

(B) specifies the actions taken by the Federal entity otherwise to ensure that audits are conducted of its programs and operations in accordance with the standards for audit of governmental organizations, programs, activities, and functions issued by the Comptroller General of the United States, and includes a list of each audit report completed by a Federal or non-Federal auditor during the reporting period and a summary of any particularly significant findings; and

(C) summarizes any matters relating to the personnel, programs, and operations of the Federal entity referred to prosecutive authorities, including a summary description of any preliminary investigation conducted by or at the request of the Federal entity concerning these matters, and the prosecutions and convictions which have resulted.

§ 8H. Rule of construction of special provisions

The special provisions under section 8, 8A, 8B, 8C, 8D, or 8E of this Act relate only to the establishment named in such section and no inference shall be drawn from the presence or absence of a provision in any such section with respect to an establishment not named in such section or with respect to a designated Federal entity as defined under section 8F(a).

§ 9. Transfer of functions

(a) There shall be transferred—

(1) to the Office of Inspector General—

(A) of the Department of Agriculture, the offices of that department referred to as the "Office of Investigation" and the "Office of Audit";

(B) of the Department of Commerce, the offices of that department referred to as the "Office of Audits" and the "Investigations and Inspections Staff" and that portion of the office referred to as the "Office of Investigations and Security" which has responsibility for investigation of alleged criminal violations and program abuse;

(C) of the Department of Defense, the offices of that department referred to as the "Defense Audit Service" and the "Office of Inspector General, Defense Logistics Agency", and that portion of the office of that department referred to as the "Defense Investigative Service" which has responsibility for the investigation of alleged criminal violations;

(D) of the Department of Education, all functions of the Inspector General of Health, Education, and Welfare or of the Office of Inspector General of Health, Education, and Welfare relating to functions

transferred by section 301 of the Department of Education Organization Act [20 U.S.C.A. 3441];

(E) of the Department of Energy, the Office of Inspector General (as established by section 208 of the Department of Energy Organization Act);

(F) of the Department of Health and Human Services, the Office of Inspector General (as established by title II of Public Law 94-505);

(G) of the Department of Housing and Urban Development, the office of that department referred to as the "Office of Inspector General";

(H) of the Department of the Interior, the office of that department referred to as the "Office of Audit and Investigation";

(I) of the Department of Justice, the offices of that Department referred to as (i) the "Audit Staff, Justice Management Division", (ii) the "Policy and Procedures Branch, Office of the Comptroller, Immigration and Naturalization Service", the "Office of Professional Responsibility, Immigration and Naturalization Service", and the "Office of Program Inspections, Immigration and Naturalization Service", (iii) the "Office of Internal Inspection, United States Marshals Service", (iv) the "Financial Audit Section, Office of Financial Management, Bureau of Prisons" and the "Office of Inspections, Bureau of Prisons", and (v) from the Drug Enforcement Administration, that portion of the "Office of Inspections" which is engaged in internal audit activities, and that portion of the "Office of Planning and Evaluation" which is engaged in program review activities;

(J) of the Department of Labor, the office of that department referred to as the "Office of Special Investigations";

(K) of the Department of Transportation, the offices of that department referred to as the "Office of Investigations and Security" and the "Office of Audit" of the Department, the "Offices of Investigations and Security, Federal Aviation Administration", and "External Audit Divisions, Federal Aviation Administration", the "Investigations Division and the External Audit Division of the Office of Program Review and Investigation, Federal Highway Administration", and the "Office of Program Audits, Urban Mass Transportation Administration";

(L) of the Department of the Treasury, the office of that department referred to as the "Office of Inspector General", and, notwithstanding any other provision of law, that portion of each of the offices of that department referred to as the "Office of Internal Affairs, Bureau of Alcohol, Tobacco, and Firearms", the "Office of Internal Affairs, United States Customs Service", and the "Office of Inspections, United States Secret Service" which is engaged in internal audit activities;

(M) of the Environmental Protection Agency, the offices of that agency referred to as the "Office of Audit" and the "Security and Inspection Division";

(N) of the Federal Emergency Management Agency, the office of that agency referred to as the "Office of Inspector General";

(O) of the General Services Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations";

(P) of the National Aeronautics and Space Administration, the offices of that agency referred to as the "Management Audit Office" and the "Office of Inspections and Security";

(Q) of the Nuclear Regulatory Commission, the office of that commission referred to as the "Office of Inspector and Auditor";

(R) of the Office of Personnel Management, the offices of that agency referred to as the "Office of Inspector General", the "Insurance Audits Division, Retirement and Insurance Group", and the "Analysis and Evaluation Division, Administration Group";

(S) of the Railroad Retirement Board, the Office of Inspector General (as established by section 23 of the Railroad Retirement Act of 1974);

(T) of the Small Business Administration, the office of that agency referred to as the "Office of Audits and Investigations";

(U) of the Veterans' Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations"; and[1]

(V) of the Corporation for National and Community Service, the Office of Inspector General of ACTION;[1]

(W) of the Social Security Administration, the functions of the Inspector General of the Department of Health and Human Services which are transferred to the Social Security Administration by the Social Security Independence and Program Improvements

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[1] So in original. The word "and" at end of subpar. (U) probably should appear at end of subpar. (V).

Act of 1994 (other than functions performed pursuant to section 105(a)(2) of such Act), except that such transfers shall be made in accordance with the provisions of such Act and shall not be subject to subsections (b) through (d) of this section; and

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act,

except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

(b) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office or agency the functions, powers, and duties of which are transferred under subsection (a) are hereby transferred to the applicable Office of Inspector General.

(c) Personnel transferred pursuant to subsection (b) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions except that the classification and compensation of such personnel shall not be reduced for one year after such transfer.

(d) In any case where all the functions, powers, and duties of any office or agency are transferred pursuant to this subsection, such office or agency shall lapse. Any person who, on the effective date of this Act [Oct. 1, 1978], held a position compensated in accordance with the General Schedule, and who, without a break in

service, is appointed in an Office of Inspector General to a position having duties comparable to those performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position.

§ 10. Conforming and technical amendments

[Section amended sections 5315 and 5316 of Title 5, Government Organization and Employees, and section 3522 of Title 42, The Public Health and Welfare, which amendments have been executed to text.]

§ 11. Definitions

As used in this Act—

(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Labor, State, Transportation, or the Treasury; the Attorney General; the Administrator of the Agency for International Development, Environmental Protection, General Services, National Aeronautics and Space, Small Business, or Veterans' Affairs; the Director of the Federal Emergency Management Agency, the Office of Personnel Management or the United States Information Agency; the Chairman of the Nuclear Regulatory Commission or the Railroad Retirement Board; the Chairperson of the Thrift Depositor Protection Oversight Board; the Chief Executive Officer of the Corporation for National and Community Service;;[2] the Administrator of the Community Development Financial Institutions Fund;

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[2] So in original.

and[3] the chief executive officer of the Resolution Trust Corporation; and the Chairperson of the Federal Deposit Insurance Corporation; or the Commissioner of Social Security, Social Security Administration; as the case may be;

(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, or the Treasury; the Agency for International Development, the Community Development Financial Institutions Fund, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the United States Information Agency, the Corporation for National and Community Service,,[1] or[4] the Veterans' Administration, or the Social Security Administration; as the case may be;

(3) the term "Inspector General" means the Inspector General of an establishment;

(4) the term "Office" means the Office of Inspector General of an establishment; and

(5) the term "Federal agency" means an agency as defined in section 552(e) of Title 5 (including an establishment as defined in paragraph (2)), United

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[3] So in original. The word "and" probably should not appear.

[4] So in original. The word "or" probably should not appear.

States Code, but shall not be construed to include the General Accounting Office.

§ 12. Effective date

The provisions of this Act and the amendments made by this Act [see section 10 of this Act] shall take effect October 1, 1978.